

1 KEKER & VAN NEST LLP
2 JOHN W. KEKER - # 49092
3 jkeker@kvn.com
4 JAN NIELSEN LITTLE - # 100029
5 jlittle@kvn.com
6 BROOK DOOLEY - # 230423
7 bdooley@kvn.com
8 NICHOLAS D. MARAIS - # 277846
9 nmarais@kvn.com
10 633 Battery Street
11 San Francisco, CA 94111-1809
12 Telephone: 415 391 5400
13 Facsimile: 415 397 7188

14
15 Attorneys for Proposed Intervenor
16 SUSHOVAN HUSSAIN

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16	<i>Zarowitz v. BankAmerica Corp.</i> 866 F.2d 1164 (9th Cir. 1989)	11

Other Authorities

24	<i>Standard Chartered Bank v. Pakistan Nat'l Shipping Corp.</i> [2002] UKHL 43, [2003] 1 A.C. 959 (H.L. Eng.)	12
25	<i>Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine</i> 1097 (5th ed. 2007)	13, 14
26	<i>Ralph Ferrara, Shareholder Derivative Litigation</i> , § 14.05[2][a] (2d ed. 2014)	3

1 **I. BACK TO FIRST PRINCIPLES: THE QUESTIONS THE COURT WANTED**
 2 **BRIEFED.**

3 On August 25, the Court refused to grant preliminary approval to the parties' proffered
 4 settlement, giving HP and Plaintiff's counsel a week to file a revised settlement that clarified their
 5 fee arrangement. After business hours nine days later, HP filed an Amended and Restated
 6 Settlement, which simply kicked the fee can down the road and did nothing to disinfect the
 7 settlement of the \$18–\$48 million payoff of plaintiffs' lawyers—money that HP itself will hand
 8 over in exchange for a broad release and claims bar for company insiders. *See* Dkt. 209¹ (Hussain
 9 Suppl. Brief) at 11–13.

10 Also at the August 25 hearing, the Court asked the parties to brief two questions:

11 1. What factors should the Court consider at the preliminary approval stage?
 12 2. Should the concerns raised by Mr. Hussain and others before the Court be
 13 addressed via intervention or objection?

14 HP's and Plaintiff's September 4 briefs ignore the Court's questions, choosing instead to
 15 again oppose Mr. Hussain's motion to intervene (which has been fully briefed since August 11)
 16 by launching an *ad hominem* attack against him for daring to question the settlement. Much as
 17 HP did during its “internal investigation,” the company attempts to deflect attention from the
 18 settlement's fatal flaws by shifting the focus to someone—anyone—else. To that end, HP hand-
 19 selects two documents from its vaunted database of 17.5 million, which it then knowingly uses
 20 out of context to suggest improprieties in Autonomy's accounting—a matter that, by HP's own
 21 design, will be adjudicated in U.K. courts at another time.

22 Meanwhile, as though this Court might not notice, HP and Plaintiff simply fail to address:

- 23 • Claims of collusion in the settlement—other than to say “not so”;
- 24 • Significant infirmities in HP's proposed bar order and so-called judgment credit;
- 25 and
- 26 • The attorneys' fees problem that HP has now hidden from sight.

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¹ Unless otherwise noted, all docket references are to this matter, *In re Hewlett-Packard Company Shareholder Derivative Litigation*, Master File No. 3:12-cv-6003-CRB.

1 We will address in turn each of these issues that are of critical significance to the proposed
 2 settlement.

3 **II. HP AND PLAINTIFFS FAIL TO MAKE THE CASE FOR PRELIMINARY
 4 APPROVAL**

5 Tellingly, HP spends just one sentence of its 30-page brief discussing the standards and
 6 tests for preliminary approval of its settlement—one of two questions the parties were directed to
 7 address. And, even in that single sentence, HP significantly downplays both the case it cites and
 8 the relevant standard:

9 For the Court to grant preliminary approval and schedule [the fairness] hearing, the
 10 Court ‘need only conclude that the settlement of the claims on the agreed upon
 11 terms is “within the range of possible approval.”’

12 Dkt. 210 (HP Suppl. Brief) at 1 (citing *In re NVIDIA Corp. Deriv. Litig.*, No. C-06-06110-
 13 SBA(JCS), 2008 WL 5382544 (N.D. Cal. Dec. 22, 2008)).² The Court’s analysis in *NVIDIA* was
 14 in fact substantially more detailed than that, and—in language that HP has simply omitted—
 15 Judge Armstrong immediately went on to explain that:

16 To determine whether the Settlement is ‘within the range of possible approval,’ the
 17 Court must evaluate whether the Settlement is ‘fair, reasonable, and adequate’ and
 18 ensure that the agreement is ‘not the product of fraud or overreaching by, or
 19 collusion between, the negotiating parties.’

20 *Id.* at *2 (citations omitted) (emphasis added). This Court’s task is not “only” to reach a
 21 superficial conclusion about the “range of possible approval,” as HP urges (although, even if that
 22 were the test, the proposed settlement would surely fail). Rather, the criteria that must be
 23 addressed are those that Mr. Hussain laid out in his September 4 brief:

- 24 • Is this settlement the product of serious, informed, non-collusive negotiations?
- 25 • Is it free of any obvious deficiencies?
- 26 • Is it free of preferential treatment to class representatives or segments of the class?
- 27 • Does it fall within the range of possible approval?

28 See, e.g., *In re High-Tech Employee Antitrust Litig.*, 11-CV-02509-LHK, 2014 WL 3917126,

2 ² It is worth noting that HP continues to rely on cases that highlight the inadequacies of its own
 3 proposed settlement. In *NVIDIA*, for example, the Northern District of California granted
 4 preliminary approval to the proposed settlement because, in addition to the governance policies
 5 and changes, *NVIDIA* obtained significant financial benefits amounting to more than
 6 \$15.8 million. *In re NVIDIA*, 2008 WL 5382544, at *3. For more, *see infra* Section II.B.1.

1 at *17 (N.D. Cal. Aug. 8, 2014) (denying preliminary approval of a \$324.5 million settlement);
 2 *Cordy v. USS-Posco Indus.*, 12-CV-00553-JST, 2013 WL 4028627, at *4 (N.D. Cal. Aug. 1,
 3 2013) (Tigar, J.) (denying preliminary approval of a \$3.5 million settlement because plaintiffs
 4 provided “no information about the maximum amount … class members could have recovered”).

5 HP not only fails to identify these issues—it fails to address them, too.

6 **A. The unrebutted evidence shows that this settlement is collusive.**

7 As Mr. Hussain has noted from the outset, settlements like this one are inherently
 8 vulnerable to “collusion between … defendants (typically the corporation’s directors or officers)
 9 and the plaintiff’s counsel, who generally receive their attorneys’ fees from the corporation as
 10 part of the agreement.” Ferrara, *Shareholder Derivative Litigation*, § 14.05[2][a] (2d ed. 2014).
 11 And courts should be particularly vigilant when those attorneys’ fees are the only money
 12 changing hands—where, as here, the Individual Defendants dip into company coffers to pay
 13 exorbitant “attorneys’ fees” while the company and its shareholders are expected to settle for
 14 cosmetic governance reforms. *Id.* (collecting cases rejecting settlements involving “cosmetic”
 15 reforms and no monetary payment).

16 Here, the evidence suggests that HP is paying plaintiffs’ counsel between \$18 and
 17 \$48 million to sign away not just this lawsuit—but the company’s current and future ability to sue
 18 the Individual Defendants for a broad range of sins. *See, e.g.*, Dkt. 209 at 4. When the Court
 19 explained that it was “not going to approve the fee arrangement, period. That’s out,” *see* Hearing
 20 Tr. (Aug. 25, 2014) at 18:16–17, HP and plaintiffs’ counsel came up with another plan: asking
 21 this Court to sign off on their proposed settlement with a handshake agreement that the fee issue
 22 would be resolved sometime in the future. That arrangement is disingenuous (at best) and fatal to
 23 preliminary approval. By stripping the fee provision from the proposed settlement and notice, the
 24 parties have made it impossible for this Court and HP’s shareholders to assess (i) how much the
 25 company is paying plaintiffs’ counsel to walk away from this lawsuit and forgive the Individual

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1 Defendants for all their wrongdoing,³ (ii) what the nature of plaintiffs' counsel's future
 2 engagement is, and the extent to which the promise of future work has affected their judgment in
 3 the present matter, and (iii) how much of the final agreement is made up of the \$18–48 million in
 4 fees.⁴

5 HP's new plan to put off the fee question until no one is looking is brazen and
 6 unprecedented. After this Court told them 'no way,' HP and lead derivative counsel tried to
 7 mediate the issue, but failed;⁵ now they plan to 'arbitrate' it with Retired Judge Vaughn Walker
 8 and return for this Court's blessing sometime in the future. But they have already made their
 9 deal: with Judge Walker in attendance, HP promised to pay at least \$18 million for services
 10 performed—an amount that would be paid whether or not Autonomy or its executives were ever
 11 sued—and promised to let plaintiffs' counsel "participate" in a lawsuit in England (where they
 12 are not admitted to practice), which, if successful, could put an additional \$30 million in their
 13 pockets. How is an 'arbitration' going to yield a different result when the parties have already
 14 reached an agreement? There is simply no getting away from the fact that the agreement to give
 15 the HP insiders a free pass in the form of a bar order was—and still is—part of an agreement that
 16 included paying off the derivative lawyers.

17 Remarkably, in the face of these allegations, there has been nothing but silence. HP's
 18 brief never mentions, let alone explains, its new "fee arrangement" with plaintiffs' counsel. Nor
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22 ³ See, e.g., Compl., ¶¶ 1 ("HP's fiduciaries misrepresented facts to conceal their own failings."),
 23 74 ("HP's officers and directors have also knowingly made false statements to the press ... that
 24 would expose HP officers and directors to fraud claims."), 93 (claiming that Apotheker and
 Whitman lied about KPMG's involvement), 173 (Apotheker, Lane and others were so "desperate
 to close a 'transformative' deal" that they "short circuit[ed] appropriate due diligence.").

25 ⁴ Typically, courts compare attorneys' fees to the total settlement value. "Twenty-five percent is
 26 the 'benchmark' that district courts should award in common fund cases." *In re Pac. Enterprises
 Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (internal citations omitted). For \$48 million to hit
 27 that 25% benchmark, HP would need to recover \$192 million through this settlement.

28 ⁵ Buried in a footnote in HP's latest submission, it concedes that the parties have been unable to
 resolve the fee problem—and yet, incredibly, they continue to seek this Court's stamp of approval
 for their half-finished settlement proposal. See Dkt. 210, at i. n.1 ("After the August 25, 2014
 hearing, plaintiffs and HP sought to mediate plaintiffs' claims for attorney's fees....").

1 does HP offer anything to rebut claims of collusion.⁶ HP must do something to show this Court
 2 (and HP's shareholders) that its proposed settlement is "noncollusive"—especially given the
 3 courts' general concerns about fee-only deals and the troubling fee arrangement history in this
 4 case. Without it, this Court cannot grant HP's motion for preliminary approval.

5 **B. The unrebutted evidence shows that this settlement is unfair.**

6 **1. The proposed settlement is not within the range of possible approval.**

7 HP spends two pages of its brief discussing the only benefit this settlement confers on the
 8 company: cosmetic governance reforms that neither Mr. Hussain nor HP's shareholders have yet
 9 been able to review. From HP's summary, though—and as this Court has already suggested—it
 10 seems likely these are measures that HP ought to have taken even without this litigation: ensuring
 11 that HP's Finance and Investment Committee "is composed of members with significant M&A
 12 experience," checking that the company conducts "due diligence and related processes,"
 13 providing "training for employees without M&A expertise." Dkt. 210 at 13–14.

14 HP claims that these "significant reforms ... justify approval of the settlement"—relying
 15 for that assertion on this Court's approval of the *NVIDIA* settlement. *Id.* at 15. What HP does not
 16 mention, though, is that the *NVIDIA* settlement was approved specifically because in addition to
 17 "the valuable corporate governance policies and changes, NVIDIA was able to obtain significant
 18 financial benefits that the parties represent amount to more than \$15.8 million." *In re NVIDIA*,
 19 2008 WL 5382544, at *3 (Armstrong, J.) (emphasis added). In fact, almost all of HP's cited
 20 cases involve financial recoveries that show just how far outside "the range of possible approval"
 21 HP's proposal really is:

22 • In *In re Pacific Enterprises*, "the parties agreed that Pacific Enterprises would
 23 receive \$12 million from its officers' and directors' insurers" to settle the
 24 derivative lawsuit. *In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 375 (9th Cir.
 25 1995);

26
 27 ⁶ Plaintiff addresses the collusion issue with one conclusory sentence: "Plaintiff's decision to
 28 settle with defendants had nothing to do with 'collusion,' ... but rather an informed, reasoned
 determination that HP had been defrauded." Dkt. 208 at 2. Unsurprisingly, Plaintiff's counsel
 offers no explanation or evidence, simply asking this Court to take them at their word.

- In *Franklin v. Kaypro Corp.*, “[t]he plaintiffs and the settling defendants agreed to settle for \$9.25 million.” 884 F.2d 1222, 1224 (9th Cir. 1989); and
- In *In re Oracle*, in exchange for the dismissal of class claims, “Oracle will pay \$23.25 million … and Arthur Andersen will pay \$1.75 million....” *In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1178 (N.D. Cal. 1993).

More significantly, though, HP fails altogether to address the other half of its unbalanced *quid pro quo*: the incredibly broad releases and claims bars for its insiders. If anything, HP’s latest filings make the situation all the more concerning.

First, the Court should be especially wary of HP’s “independent” committee’s decision to give the Individual Defendants a free pass. *In re Oracle*, 829 F. Supp. at 1187 (“Independence is not established by the fact that directors are not defendants in the derivative action. … [W]e must be mindful that directors are passing judgment on fellow directors in the same corporation and fellow directors, in this instance, who designated them to serve both as directors and committee members.”). For its part, HP’s counsel does nothing to explain why the Individual Defendants are being released in exchange for zero financial contribution. And although the DRC Resolution concludes (without explanation) that “no claims [should] be pursued as to present and former officers and directors,” Dkt. 211-1 at 52, it does not appear to recommend or support the wide-ranging releases provided by the proposed settlement.⁷

Second, it appears from the DRC’s Resolution that HP actually intends to sue its own subsidiary, Autonomy—against whom claims will not be released—to generate losses:

- b. Cause **Bidco** to direct Committee counsel to assert claims **against Autonomy** under English law (including FSMA) arising out of Autonomy’s publication or other disclosure of materially misleading information respecting its financial condition, operating results, future prospects and business model;
- c. Cause **Autonomy** to direct Committee counsel to take such actions as are necessary and appropriate under English law (including compliance with any applicable pre-action protocols) to commence proceedings **against Lynch and Hussain in England** for injury incurred in connection with Bidco’s claims against Autonomy and Autonomy’s other losses....

⁷ As Mr. Hussain noted in his September 4 brief, these broad releases mean that HP will no longer be able to sue Individual Defendants, like Meg Whitman, for “any … misleading proxy statements” filed in 2013, or “any sales of [Individual Defendants’] personally held stock”—and on and on. For more, *see* Dkt. 209 at 4.

1 Dkt. 211-1 at 64; *see also id.* at 87 (“Determine that Bidco has a claim against Autonomy under
 2 English law....”); *id.* at 88 (outlining similar plan against Deloitte). Given HP’s plan, its lawyers’
 3 claims that this settlement will help HP reduce its litigation costs are vacuous; if anything, HP
 4 will now have to spend money prosecuting and defending the same lawsuit! Because this
 5 settlement does not free HP from future litigation, the only parties benefiting from the broad
 6 releases and claims bars are those parties who have contributed nothing to the settlement
 7 proposal: the Individual Defendants.

8 In short, this settlement leaves plaintiffs’ counsel richer (by undisclosed tens of millions
 9 of dollars) at HP’s expense, while HP’s insiders walk free from this and other unrelated future
 10 litigation. Because the proposed *quid pro quo* is so woefully unbalanced, this deal cannot
 11 possibly fall within the “range of possible approval.”

12 **2. HP’s settlement is consistent with its long-term strategy of blaming
 13 others in an effort to forever conceal the Individual Defendants’
 failures.**

14 HP’s principal defense of its underwhelming settlement proposal is that the parties now
 15 agree that the plaintiff has no case. *See, e.g.*, Dkt. 210 at iii (“[I]f this action were not to settle, ...
 16 HP would move to dismiss it under a fundamental principle of Delaware law....”); *id.* at 5 (“The
 17 DRC found ... that HP had no claim against [HP’s officers and directors].”). Of course, if that
 18 were true, it would be much cheaper for HP to move to dismiss this case, or to secure plaintiffs’
 19 counsel’s agreement to dismiss it. But what HP’s insiders want—and will get through this
 20 settlement—is something they could never achieve through litigation: broad releases that will
 21 protect them from future lawsuits on a whole host of (often unrelated) claims.

22 HP’s *ipse dixit* claim that no case exists against the insiders is not only tainted irreparably
 23 by the payoff to its adversaries, but is simply ridiculous. Indeed, many of the Independent
 24 Committee’s findings actually support the plaintiffs’ case against HP insiders:

25 • HP now claims that it valued Autonomy at \$17.1 billion, which included
 26 \$7.9 billion in revenue and related synergies—making Ms. Whitman’s
 27 mismanagement of the merger more relevant than ever. Dkt 211-1 at 33. In fact,
 28 HP specifically notes that its “impairment model showed ... a loss of \$5.3 billion

1 of originally projected synergies.” *Id.* at 45.

2 • HP’s CFO Catherine Lesjak opposed the Autonomy acquisition because, in part,
 3 “HP’s history of not executing on its major acquisitions did not counsel” in favor
 4 of proceeding. *Id.* at 34. HP’s general counsel, Michael Holston, “agreed with
 5 Lesjak’s comments.” *Id.* So concerned were HP’s non-management directors that
 6 they asked Léo Apotheker to reconsider “whether the Acquisition should be
 7 pursued.” *Id.* Apotheker marched ahead anyway.

8 • HP acknowledges that, in conducting “due diligence” before acquiring Autonomy,
 9 it “decided … to rely principally on (i) publicly available data and (ii) other
 10 information exchanged between Autonomy and HP orally, rather than in writing.”
 11 *Id.* at 31. (Somewhat inconsistently, Plaintiff’s counsel claims its own “skeptical”
 12 evaluation of HP’s settlement proposal involved an analysis of “due diligence
 13 materials.” Dkt. 208 at 7.) In other words, HP believes that its due diligence
 14 efforts were minimal but satisfactory.

15 And these admissions come from a Board and Committee whose independence, partiality
 16 and objectivity are undoubtedly flawed. As is clear from the Independent Committee’s
 17 Resolution, Committee Counsel was given tens of millions of dollars to clear HP and point the
 18 finger at Autonomy.⁸ Indeed, the vast majority (84%) of documents made available for their
 19 review were Autonomy’s, not HP’s—suggesting the investigators knew from the beginning that
 20 they were looking to blame Autonomy, not HP insiders, for the calamitous merger. And both the
 21 Board and Committee Counsel are plainly beholden to the Individual Defendants, showing great
 22 deference to the financial well-being of the insiders the proposed bar order seeks to protect.

23 HP’s attempts at misdirection—evident in both the DRC Resolution and the proposed
 24 settlement—are by no means new. That the company has a long history of covering up its own
 25 mismanagement of the Autonomy acquisition by shifting blame to others is apparent from the

26 ⁸ The DRC Resolution explains that Committee Counsel spent “approximately 34,000 hours”
 27 looking into these claims. Dkt. 211-1 (HP Resolution) at 16. At a blended rate of \$750 per hour,
 28 Committee Counsel’s “independent” report—which happened to find that HP did no wrong—
 would have cost HP a staggering \$25.5 million. (The Committee also paid “experts and
 consultants” for another 16,000 hours of work, which presumably cost many millions more.)

1 DRC's own chronology of events leadings up to HP's Q4 2012 announcement. The DRC
 2 resolution describes those events as follows:

3 On November 2–4, 2011, HP's accountants reviewed Deloitte's work papers, including
 4 “areas of audit risk,” and “identified Autonomy's hardware revenue, which E&Y reported to HP.”
 5 Dkt. 211-1 at 40. On May 25, 2012, HP received information from an Autonomy official about
 6 alleged improprieties relating to hardware sales, end of quarter VAR transactions, and hosting
 7 transactions. *Id.* As a result, HP retained forensic accountants PWC on May 30, 2012. *Id.* at 42.
 8 On June 5, 2012, despite HP's having known for up to seven months about these alleged
 9 accounting issues, Meg Whitman attributed Autonomy's issues to “scaling challenges,” a
 10 statement HP and Ms. Whitman apparently still stand behind. *Id.* at 42.⁹ By mid-July, PWC had
 11 completed the first phase of its review and identified “various issues including those relating to
 12 pass-through hardware sales, channel sales, … barter transactions and modifications to licensing
 13 and hosting transactions.” *Id.* at 2. On September 10, 2012, HP filed its Form 10-Q for Q3 2012,
 14 again saying nothing about accounting issues having any effect on Autonomy's value; to the
 15 contrary, HP averred that “at the time of the Autonomy acquisition in October 2011, the fair value
 16 of Autonomy approximated the carrying value.” *See id.* at 46. At this point, HP had had
 17 Deloitte's work papers for over 10 months, “whistleblower” information for almost four months,
 18 and it had been two months since PWC completed the first phase of its forensic review—and yet,
 19 as of the Fall of 2012, HP apparently saw nothing in this wealth of information that required a
 20 write-down of Autonomy.

21 Indeed, it was not until November 20, 2012—more than a year after E&Y's review of
 22 Deloitte's work papers and six months after the “whistleblower” claimed accounting
 23 improprieties at Autonomy—that HP, with the assistance of “an expert public-relations firm to
 24 assist its media outreach,” claimed that a “majority” of the \$8.8 billion write-down was
 25 attributable to accounting improprieties at Autonomy. *Id.* at 47. In the analyst call that day, HP's
 26 CFO Catherine Lesjak claimed that “over \$5 billion [of the write-down] [was] related to

27 ⁹ *See* Whitman Reply ISO MTD (Dkt. 188), *In re HP Secs. Litig.*, Master File No. 12-cv-5980-
 28 CRB, at 9 (arguing that Ms. Whitman's statements—including her view that “this [was] a classic
 case of scaling a business from start-up to grownup”—were not false or misleading).

1 accounting improprieties.”¹⁰ The DRC report also notes, however, that HP changed its mind
 2 about how much blame was attributable to Autonomy: just one month later, when HP filed its
 3 Form 10-K with the SEC on December 27, HP backed away from the “majority” language
 4 “[b]ecause E&Y could not ‘audit’ its quantification of Autonomy’s accounting errors.”
 5 Dkt. 211-1 at 47. Who, then, was responsible for the “majority” of the impairment charge? What
 6 are the “other factors that led to Autonomy’s loss of value” that are hinted at in the DRC’s
 7 resolution—but not discussed? *See id.* at 45. It is precisely these “other factors” that HP is trying
 8 to make sure no one ever knows about, by burying them with this settlement. And it is those
 9 “other factors” that may form the basis for contribution claims against HP insiders—especially
 10 those officers who were responsible for Autonomy’s failed integration—should HP seek to lay
 11 blame at the feet of Mr. Hussain and other former Autonomy executives or advisors.

12 **III. SUSHOVAN HUSSAIN MAY PROPERLY INTERVENE TO PROTECT HIS
 13 RIGHTS.**

14 The second issue the Court asked the parties to brief was whether this settlement “can ...
 15 be tested by way of objection as distinct from by way of intervention....” Hearing Tr.
 16 (Aug. 25, 2014), 41:18–20. HP never addresses this question—choosing instead to renew its
 17 opposition to Mr. Hussain’s motion to intervene. *See, e.g.*, Dkt. 210 at 17 (“[T]here is no purpose
 18 to be served in having [Hussain] intervene in a case that the parties have agreed to settle.”).

19 Problematically, HP not only fails to explain the differences between objection and
 20 intervention—it actively confuses them. For instance, HP argues that Mr. Hussain should not be
 21 allowed to intervene because “shareholders can object only if they have standing to file derivative
 22 litigation in the first place.” *Id.* at 18. One’s standing to object is immaterial to one’s efforts to
 23 intervene, especially given that HP is trying to restrict the rights of non-parties. (And, even if
 24 they were related, HP has mischaracterized the Ninth Circuit’s standard for objection.¹¹)

25 ¹⁰ *See* Transcript (Q4 2012 Hewlett-Packard Earnings Conference Call) at 6, available at
 26 <http://online.wsj.com/public/resources/documents/hppdf112012.pdf>.

27 ¹¹ HP continues to rely on *Zarowitz* in claiming that objectors “cannot have interests that are
 28 ‘hostile’ to those of other shareholders.” Dkt. 210 at 18–19 (citing *Zarowitz v. BankAmerica
 Corp.*, 866 F.2d 1164, 1166 (9th Cir. 1989)). In fact, the Ninth Circuit rejected the argument that
 a shareholder is deprived of his right to object because of a conflict with other shareholders—
 because it would “strip[] from an objecting shareholder his right to speak and be heard in
 opposition to a settlement....” *Zarowitz*, 866 F.2d at 1166.

1 Despite HP's second attempt to oppose Mr. Hussain's motion for intervention, the
 2 following points remain undisputed:

- 3 • Non-parties are entitled to intervene to challenge a settlement when their
 4 significant, protectable legal interests "may be impaired" by the disposition of this
 5 case. *See* Dkt. 209 at 6; Dkt. 165 (HP Opp.) at 2;
- 6 • Mr. Hussain's formal legal rights will be curtailed by the proposed settlement.
 7 *See, e.g.*, Hearing Tr., 48:15–49:4 (HP counsel explaining that Mr. Hussain will be
 8 barred from suing Ms. Whitman for contribution for her mismanagement of the
 9 acquisition); and
- 10 • Mr. Hussain's motion to intervene is timely.

11 It does not matter that Mr. Hussain "fail[ed] to attach a pleading,"¹² or that HP questions
 12 his status as a shareholder,¹³ or that HP believes his interests are "adverse" to its own. As long as
 13 HP seeks to gain an upper hand by curtailing Mr. Hussain's legal rights through a lawsuit he is
 14 not involved in, Mr. Hussain is entitled to intervene and challenge those efforts. It is absurd, and
 15 inimical to due process, to suggest that Mr. Hussain should sit by quietly while HP attempts to
 16 sign his rights away.

17 HP's reliance on its so-called "judgment credit" as a means to address Mr. Hussain's
 18 concerns is similarly unavailing. HP claims that its Complete Bar Order "constitutes very
 19 significant compensation ... in light of the perception by the underlying plaintiffs and [HP] that
 20 [Hussain] was a central figure in the violations." Dkt. 210 at 21–22 (citing *In re HealthSouth*
 21 *Corp. Sec. Litig.*, 572 F.3d 854, 866 (11th Cir. 2009)). HP's reliance on *HealthSouth* is telling in

22 ¹² To support its claim that failure to attach a pleading "renders [Mr. Hussain's] motion to
 23 intervene procedurally deficient," HP relies on *Kremen v. Cohen*, 2012 WL 2919332 (N.D. Cal.
 24 July 17, 2012). But, as Judge Koh explained in *Kremen*, a pleading is "not required 'where ... the
 25 movant describes the basis for intervention with sufficient specificity....'" *Id.* at *9. There can
 26 be no doubt here that Mr. Hussain has made his grounds for intervention perfectly clear—indeed,
 27 HP specifically revised the bar order in response to those arguments. That HP has chosen not to
 28 address those bases in its opposition papers does not somehow invalidate them.

13 As HP acknowledges, it gave Mr. Hussain restricted stock units in November 2011. Dkt. 210
 2 at 18:5. Those stocks have been in Mr. Hussain's Merrill Lynch account since
 27 November 16, 2012, and are still there to this day. *See* Declaration of Jan Nielsen Little, ¶ 3 and
 28 Exs. A–B. There is no doubt that Mr. Hussain meets the settlement's broad definition of
 Securities Holder, or that he will be entitled to object at the appropriate time.

1 at least two ways. First, HealthSouth's former CEO Richard Scrushy was a non-settling
 2 defendant—not a non-party, like Mr. Hussain—which means he was able to (and did) challenge
 3 the bar order even without intervening. Second, the Eleventh Circuit specifically noted that the
 4 bar order was balanced “by crediting non-settling defendants in any future judgment with the
 5 greater of settling defendant’s proportionate liability or the amount actually paid by the settling
 6 defendant.” *Id.* at 857–58 (emphasis added). In *HealthSouth*, the amount paid by the settling
 7 defendant—and therefore the minimum judgment credit afforded to Mr. Scrushy—was \$445
 8 million. Here, settling defendants will pay nothing.¹⁴ Moreover, even if HP were to propose a
 9 reasonable judgment credit, there is no guarantee that such a credit would protect Mr. Hussain in
 10 a foreign jurisdiction.

11 Finally, HP suggests that the Complete Bar Order is immaterial because, “[u]nder English
 12 law, … Hussain is not liable for, and therefore could not seek contribution from, any HP officer
 13 or director for any harm he or she supposedly caused Autonomy through any negligence after the
 14 deal closed.” Dkt. 210 at 22. None of the parties here is adequately equipped to discuss the
 15 meaning, relevance or effect of United Kingdom legal decisions—nor do they need to.¹⁵ If HP
 16 believes that Mr. Hussain cannot seek contribution from the Individual Defendants, then HP can
 17 and should simply remove Mr. Hussain from its proposed bar order. (In so doing, it would also
 18 obviate Mr. Hussain’s need to intervene and simplify this Court’s task.)

19 Although intervenors are now starting to line up—presumably because it has become
 20 increasingly clear that the proposed settlement is collusive and unfair—Mr. Hussain is still unique
 21 among them. He is not in negotiation discussions with HP’s lawyers, is not susceptible to a

22 ¹⁴ HP relies on two other cases to support its claim that its proposed bar order provides
 23 Mr. Hussain “the full value of any contribution claims [he] might have....” Dkt. 210 at 21. But,
 24 like *HealthSouth*, both of those cases involved substantial payments by the settling defendants. In
 25 *Franklin v. Kaypro Corp.*, the settling parties agreed to pay \$9.25 million—and, even then, the
 26 Ninth Circuit sent the settlement back to the District Court because it failed to sufficiently limit
 27 “the subsequent exposure of the nonsettling defendants.” *Franklin v. Kaypro Corp.*, 884 F.2d
 28 1222, 1232 (9th Cir. 1989). In *Gerber v. MTC Elec. Technologies Co.*, the settling parties
 contributed \$8 million, \$4.075 million and \$1.956 million. 329 F.3d 297, 301 (2d Cir. 2003).

15 We note, though, that HP appears to have confused two distinct legal concepts in its
 September 4 brief. *See* Dkt. 210 at 22. The case HP cites, *Standard Chartered Bank v. Pakistan*
Nat'l Shipping Corp. [2002] UKHL 43, [2003] 1 A.C. 959 (H.L. Eng.), deals with the defense of
 contributory negligence—not, as HP claims, with claims for contribution.

1 settlement buy-out, and is uniquely concerned with challenging the settlement's egregious bar
 2 order.

3 **IV. HP'S SELECTIVE DISCLOSURE OF DOCUMENTS RAISES MORE
 4 QUESTIONS ABOUT THIS SETTLEMENT THAN IT ANSWERS.**

5 HP's latest decision to trickle out a small handful of documents makes it clearer than ever
 6 that the company is willing to share some documents—but only those that it likes, and only to
 7 lawyers with whom it wants to curry favor. *See, e.g.*, Hearing Tr. (Aug. 25, 2014), 31:18–21
 8 (noting that HP has “been providing documents to potential objectors all along”); *id.* at 32:4–5
 9 (“[W]e worked with the Steinbergs, we worked with Copeland, we provided documents.”). This
 10 sort of selective disclosure is prohibited precisely because it is used by litigants to distort the truth
 11 “by selecting those facts or those mental impressions that will be disclosed and concealing other
 12 damaging facts or mental impressions.” 2 Edna Selan Epstein, *The Attorney–Client Privilege and*
 13 *the Work-Product Doctrine* 1097 (5th ed. 2007).

14 In HP's September 4 filing, for instance, the Independent Committee's Resolution is
 15 riddled with unjustified and unexplained redactions. These include information highly relevant to
 16 determining the propriety of the broad releases for HP insiders, such as: (i) select information
 17 about how HP quantified “the injury suffered by HP for ‘overpaying’ for Autonomy,” Dkt. 211-1
 18 at 24, (ii) “quantification of the other injury suffered by HP in connection with the acquisition,”
 19 *id.* at 25–26, (iii) information about a May 25, 2012 report to HP by an Autonomy official about
 20 Autonomy's pre-acquisition business practices, *id.* at 40–41, and (iv) information about potential
 21 claims against Autonomy, Autonomy officials and Deloitte, *id.* at 59–67.¹⁶

22 HP appears to believe that it can publish the evidence it likes, while withholding those
 23 documents it doesn't, and that it can show documents to some adversaries, but not others.
 24 Hearing Tr., 47:19–20 (“[W]e would never share that with the people that [we] are planning to
 25 sue....”); *id.* at 46:3–4 (noting that HP would “never in a million years” share reports with

26 ¹⁶ In addition, Exhibit 3 to the Wolinsky Declaration is the 12-page HP Board Resolution
 27 regarding shareholder derivative claims. This Resolution also “redact[s] for privilege”
 28 information about: potential claims against Lynch and Hussain for post-acquisition conduct,
 Dkt. 211-3 at 10–11; potential claims against other Autonomy directors and officers, *id.* at 11;
 potential claims against Catalyst, *id.*; and potential claims against Autonomy Customers, *id.*

1 Mr. Hussain, Mr. Lynch or Deloitte). This, of course, is not a legitimate privilege claim. While
 2 an attorney's advice to a Board or Board committee might be privileged, generally neither Board
 3 Committee Resolutions nor Board Resolutions are "privileged" documents. And HP's decision to
 4 publish vast chunks of these resolutions indicates that it, too, does not consider the DRC and
 5 Board resolutions privileged *per se*.

6 HP must now disclose fully unredacted versions of its Exhibits 1 and 3 for at least three
 7 reasons.

8 First, HP has offered no justification or explanation for its redactions.

9 Second, to the extent that HP contends that these resolutions are privileged, a waiver has
 10 been effected by "partial disclosure" of the document. *See, e.g.*, 1 Epstein at 407 ("It is a
 11 universally applied principle that a client cannot partially disclose a portion of a privileged
 12 communication and at the same time maintain the privilege as to the remainder."); *Tennenbaum v.*
 13 *Deloitte & Touche*, 77 F.3d 337, 340–41 (9th Cir. 1996) (waiver of privilege "protect[s] against
 14 the unfairness that would result from a privilege holder selectively disclosing privileged
 15 communications to an adversary, revealing those that support the cause while claiming the shelter
 16 of the privilege to avoid disclosing those that are less favorable"). Similarly, to the extent HP
 17 contends that these resolutions constitute attorney work product, "once partial disclosure of work-
 18 product materials is voluntarily made, total disclosure will have to be made...." 2 Epstein at
 19 1097; *see also United States v. Reyes*, 239 F.R.D. 591, 598 (N.D. Cal 2006) (Breyer, J.).
 20 ("[A]ttorney work-product privilege is not absolute and may be waived, for example, when an
 21 attorney attempts to use the work product as testimony or evidence, or reveals it to an adversary
 22 to gain an advantage in litigation.")

23 Third, any privilege claim is waived to the extent HP has shared documents with third
 24 parties. According to HP's own filings, HP made an "extensive presentation on the findings and
 25 recommendations" of the DRC to counsel from Cotchett Pitre and Robbins Geller as well as state
 26 derivative plaintiffs' counsel in February 2014. *See* Dkt 149 at 6:26–7:3; Dkt 149-1 at ¶ 7. The
 27 Demand Review Committee's "findings" having been shared with lawyers who were (at least
 28 then) opposing counsel, which constitutes a waiver of privilege as to the contents of the

1 Committee Resolution or other documents discussing the Demand Review Committee's findings.
 2 "Generally disclosure of confidential communications or attorney work product to a third party,
 3 such as an adversary in litigation, constitutes a waiver of privilege as to those items." *Bd. of*
 4 *Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 237 F.R.D. 618, 622
 5 (N.D. Cal. 2006).¹⁷

6 Finally, Mr. Hussain also notes that HP appears to have received a document—the
 7 "Committee Counsel Presentation"—which apparently "supports" the Committee's Resolution.
 8 See Dkt 211-3 at ¶¶ 6–7. Review of this document is also necessary to evaluate the validity of the
 9 Board's decision to terminate this derivative lawsuit.

10 Whether Mr. Hussain proceeds through intervention or objection, he is entitled to at least
 11 the following discovery:

- 12 • Fully unredacted copies of (i) the amended complaint,¹⁸ (ii) the DRC Resolution;
 13 and (iii) the HP Board of Directors' Resolution;
- 14 • The Committee Counsel Presentation referenced in the Board's Resolution,
 15 Dkt. 211-3 at ¶¶ 6–7;
- 16 • Access to information concerning the "extensive presentation on the findings and
 17 recommendations," the "electronic databases containing tens of millions of
 18 documents," and the reports of interviews of "nearly 100 individuals" referenced
 19 in the Declaration of Judge Walker filed in connection with the proposed
 20 settlement; and
- 21 • The report of the "Independent Committee's findings and recommendations,"
 22 which formed the basis for HP's Board's resolution "that there is no merit to the
 23 claims asserted against the named defendants in the Federal Action or the State
 24 Actions (other than as to Legacy Autonomy Official Michael Lynch)...."

25 _____
 26 ¹⁷ While HP has not asserted any "settlement discussion privilege," we would note that even if a
 27 settlement privilege were to attach to discussions between HP and plaintiffs' counsel, that
 28 "settlement privilege" would not restore a waived attorney client privilege with respect to
 attorney client documents that HP shared during negotiations with its then-opposing counsel.
Atari Corp. v. Sega of Am., 161 F.R.D. 417, 420 (N.D. Cal. 1994) ("Any voluntary disclosure
 inconsistent with the confidential nature of the work product privilege waives the privilege.
 '[D]isclosure to the adverse party is inherently inconsistent with the adversary system'. Waiver of
 a privilege may occur by voluntary disclosure to an adverse party during settlement negotiations,
 despite any agreement between the parties to keep the information confidential.") (internal
 citations omitted).

¹⁸ Although the Court ordered that the Complaint be unsealed ("except the portions identified in
 its Order of May 20, 2013"), Dkt. 83 at 1, no unredacted version has been filed.

1 **V. HP'S ATTEMPTS TO "SHOOT THE MESSENGER" ARE HOLLOW AND
2 INACCURATE DISTRACTIONS.**

3 Ironically, Plaintiff's counsel accuses Mr. Hussain of "deflecting attention" away from
4 some unexplained future lawsuit and towards the proposed settlement that is actually at issue in
5 this case. Dkt. 208 (Pl.'s Suppl. Brief) at 2:2-3. Of course, that is indeed what Mr. Hussain
6 seeks to do: cut through HP's noise and press releases to focus the discussion on the collusive and
7 unfair settlement currently before this Court. Although Mr. Hussain will not be sidetracked by
8 HP's frantic September 4 rant, it is worth noting several things:

9 First, deals referenced in the two documents cited by HP were reviewed by Autonomy's
10 Audit Committee and outside auditors. Mr. Hussain stands ready to defend against HP's false
11 allegations at the appropriate time and in the appropriate forum.

12 Second, by refusing to produce any of its 17.5 million documents and then selectively
13 parading just two emails—both of which were knowingly offered out of context—HP is doing
14 precisely what waiver of privilege is designed to prevent: distorting the record and hiding
15 evidence it does not like.

16 Third, to give true meaning to Plaintiff's allegations of "deflection" and misdirection,
17 HP's rambling seven-page discussion of these deals should be weighed against the number of
18 sentences HP dedicates to rebutting the allegations that this settlement is collusive: zero.

19 **VI. CONCLUSION**

20 HP and Plaintiff have failed to address the Court's questions or present any evidence that
21 their proposed settlement is fair and noncollusive. If anything, the settlement—now oddly silent
22 on attorneys' fees—is even less ripe for approval than it was on August 25.

23 There is also no meaningful dispute that Mr. Hussain is entitled to intervene to protect his
24 legal interests, which HP concedes will be jeopardized by the proposed bar order. Mr. Hussain is
25 //
26 //
27 //
28 //

1 willing to proceed as the Court prefers, provided that he is afforded the relief requested and the
2 discovery required to make his participation meaningful.

3 Dated: September 17, 2014

4 KEKER & VAN NEST LLP

5 By: /s/ John W. Keker

6 JOHN W. KEKER
7 JAN NIELSEN LITTLE
8 BROOK DOOLEY
9 NICHOLAS D. MARAIS

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10 Attorneys for Proposed Intervenor
11 SUSHOVAN HUSSAIN